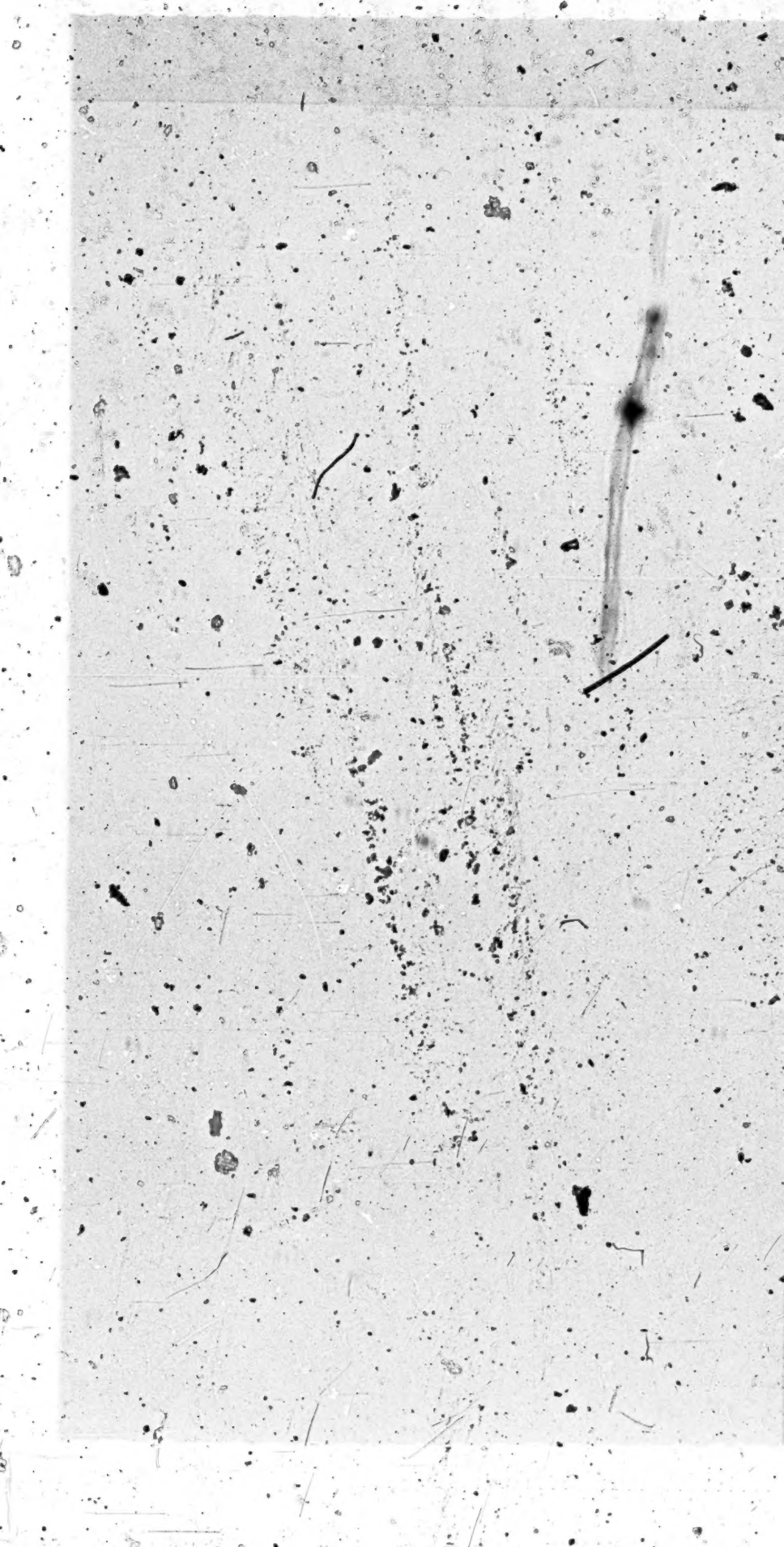


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 426

UNITED STATES OF AMERICA,
Appellant,

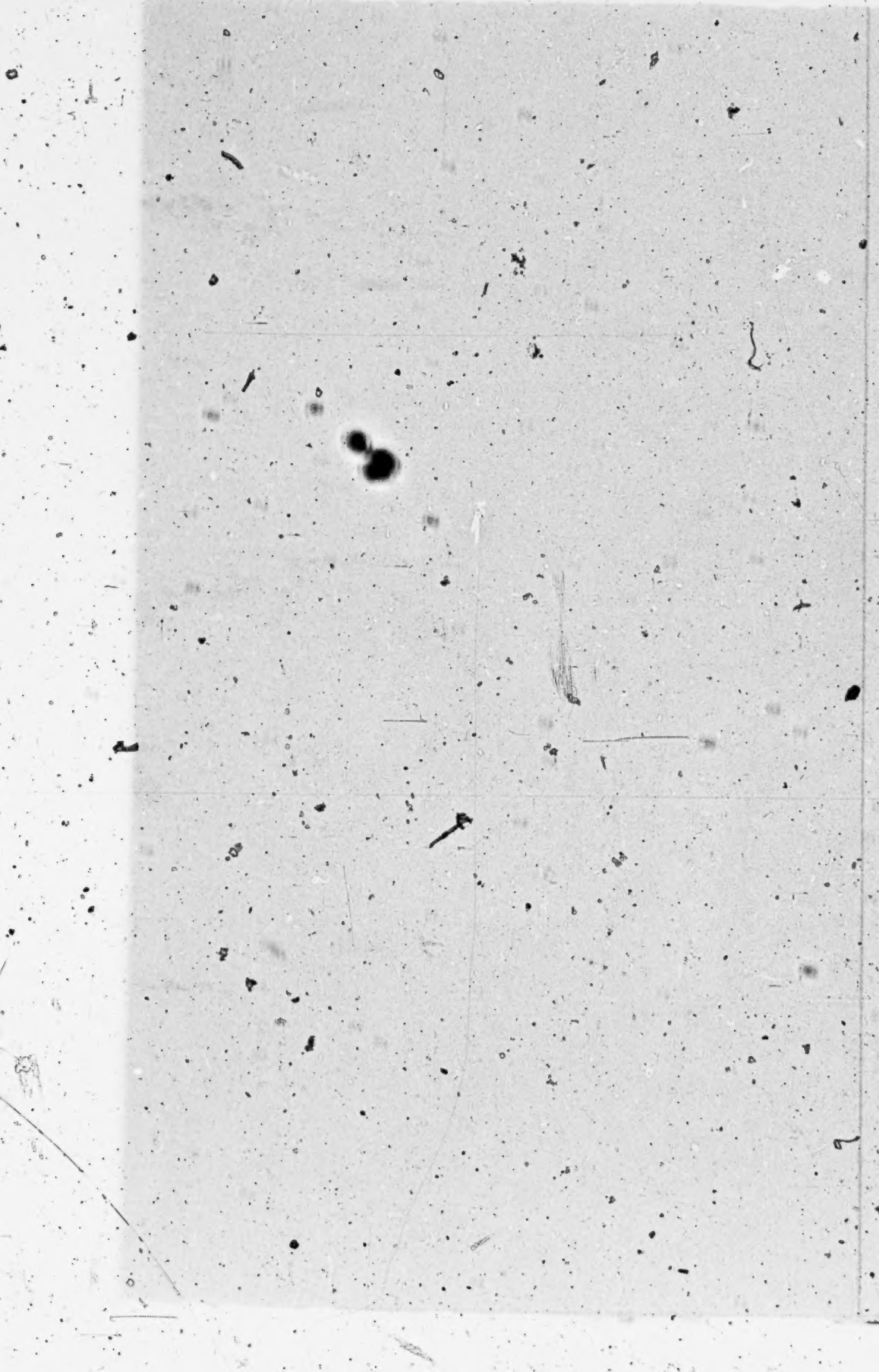
versus

CLARENCE E. HOOD, JR., ET AL.,
Appellees.

BRIEF FOR ROY F. BRASHIER AND JAMES H. WILKINSON, APPELLEES.

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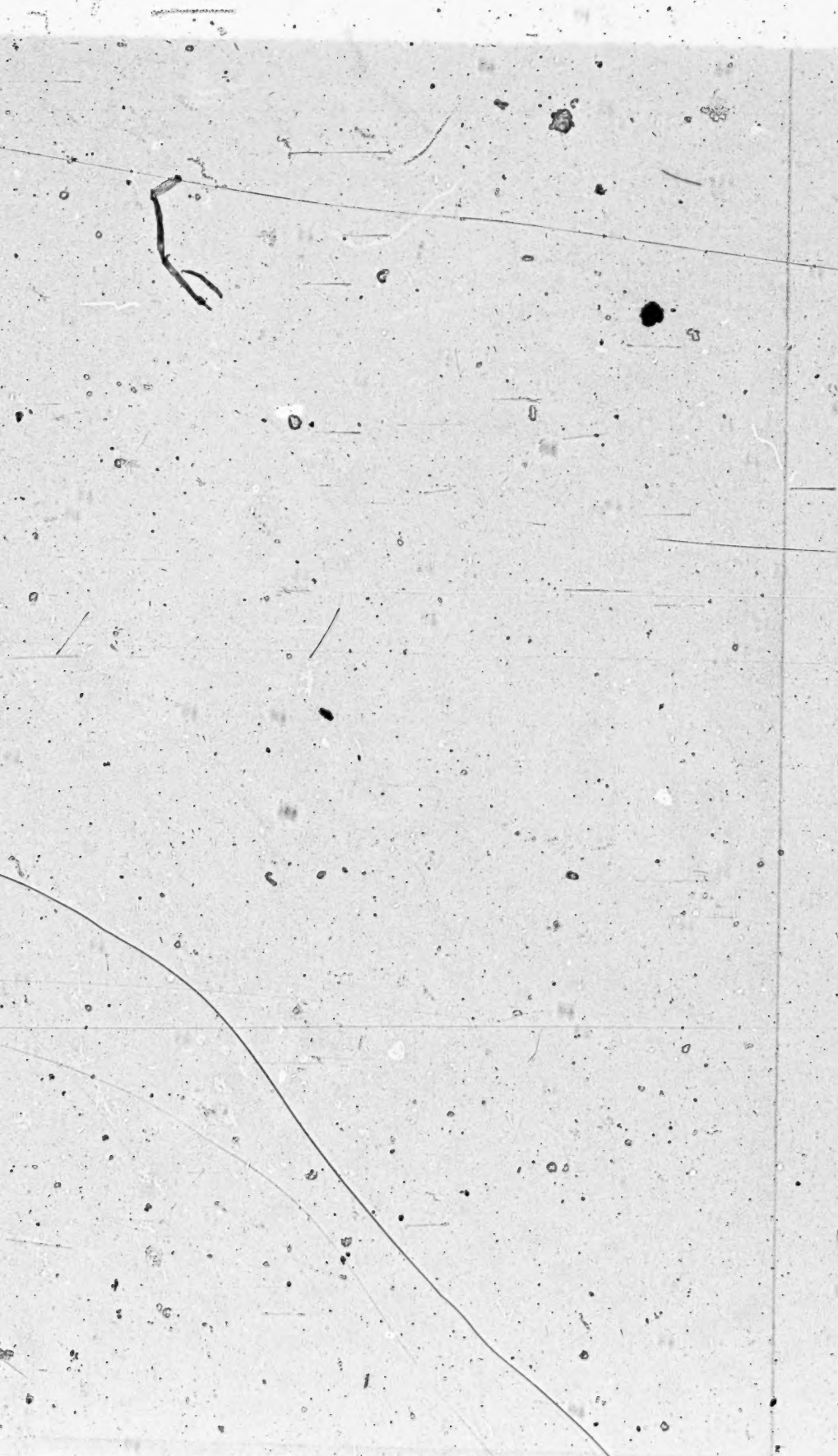
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IN THE
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OCTOBER TERM, 1951.

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CLARENCE E. HOOD, JR., ET AL.,
Appellees.

BRIEF FOR ROY F. BRASHIER AND JAMES H. WILKINSON, APPELLEES.

Question Presented.

The question presented by this appeal is whether an indictment charging solicitation of political contributions in consideration of use of influence towards obtaining an "appointive office or place under the United States" charges a crime under 18 U. S. C. 215 when it was admitted that there was no such appointive office or place as that sought to be described in the indictment.

The indictments charged (see e. g. count thirty-one, R. 8),

> "That . . . . Roy F. Brashier did . . . solicit from Early Gray Harvey, as a political contribution, the sum of three hundred dollars in consideration of the defendant's promise of support and use of influence in obtaining . . . an appointive office and place under the United States, namely, an appointment as chairman of the County Ration Board to be set up and created under the Office of Price Stabilization . . ."

The statute, Section 215, forbids the prescribed acts only in connection with obtaining "any appointive office or place under the United States."

The court below sustained the motion to dismiss counts thirty-one, thirty-two, and thirty-three (R. 8-9), because the parties had stipulated (R. 14), and the court knew judicially that there was no such appointive office or place as that described in these counts of the indictment.

> "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." *Lanzetta v. New Jersey*, 306 U. S. 451, 453, 83 L. Ed. 888, 890.

ARGUMENT.

I.

The Solicitation Prescribed by 18 U. S. C. 215 Relates Solely to an Actual Appointive Office or Place Under the United States.

The action of the court below was predicated upon a construction of the statute on which the indictments were based. It looked to the language of the statute, interpreted in the light of its context and history, and from that language so interpreted ascertained the will of congress. The court below was interpreting a penal statute and strict construction was required. It was not permitted to depart from the words and context of the statute to endeavor to extend its terms to a conjectured case clearly beyond its terms. In so doing, the court proceeded on sound ground and reached a judgment manifestly correct.

In the court below the government placed its sole reliance on the *Barnow* case and that case is the chief one relied on here and will have detailed consideration.

United States v. Barnow 239 U. S. 74, 60 L. Ed., 155.

In that case this court set itself the task of determining what the statute before it meant. That is always the task of the court. It sought to learn that meaning from the words used in the statute interpreted in the light of the underlying purpose of the statute.

The statute then under consideration (now 18 U. S. C. 912) was a false pretense statute. Barnow had pretended to be a federal officer, occupying a fictitious office which had no existence. The question was whether the fact that the office was fictitious and not real would exculpate Barnow from the results of his false pretense. In other words, the court was called upon to decide whether one who perpetrates a small deception should be punished while the perpetrator of the larger deception should go free.

This court was not considering at all whether it would extend the language of that statute so as to include a state of facts not embraced in the statute as congress had written it. Its only task was to look to the language of congress and decide its meaning in the light of the purpose of the statute.

The court concluded that false pretense was the essence of the statute and that congress intended that one falsely pretending to be a fictitious officer was covered by the statute as fully as one falsely pretending to be a real officer. A look to the language of that opinion will demonstrate that this is correct (239 U. S. 76-7, 60 L. Ed., 156-7):

> "Not doubting that a false personation of a particular officer or employee of the government, . . . is within the denunciation of Section 32, we think it has a broader reach. No convincing reason is suggested for construing it more narrowly than the plain import of its language. To 'falsely assume or pretend to be an officer or employee acting under the

authority of the United States, or any department, or an officer of the government thereof,' is the thing prohibited. One who falsely assumes or pretends to hold an office that has a *de jure* existence is admittedly within its meaning. That is, where the assumption or pretense is false in part, but contains a modicum of truth, the statute is violated. Why should it be deemed less an offense where the assumption or pretense is entirely false, as where the very office or employment to which the accused pretends title has no legal or actual existence? . . . it would strain the meaning of the section to hold that the offender must act as a veritable officer of the government would act. . . .

"It is the false pretense of federal authority that is the mischief to be cured. . . . Obviously, if the statute punished the offense only when an existing office was assumed, its penalties, could be avoided by the easy device of naming a nonexistent office. Therefore, it seems to us, the statute is to be interpreted according to its plain language as prohibiting any false assumption or pretense of office or employment under the authority of the United States . . ."

Here, then, is the holding of the court. It found the meaning of the statute from its plain language. It found that the gist of the crime was the falsely pretending to be an officer of the United States. Granted the pretense, the crime was complete. The donning of the vestments of office without authority was sufficient to trap the unwary. The statute prescribed the pretense, the impersonation, and included, in its plain language, the false pretending to act, either as a real federal officer or a fictitious federal officer.

Every word used in the Barnow opinion was employed in the process of interpreting the true meaning of the language congress had used. The language quoted at pages 18-19 of the government's brief was used *arguendo* as a part of the process of reasoning from which it reached the conclusion that the statute punished pretense with respect to a fictitious office to the same extent as it did to a "veritable" office.

What Appellant seeks to do is to lift that language from context and argue from it that this court was holding that any course of conduct calculated to impair the spirit of respect and good will for government office-holders would come within the condemnation of that statute.

Of course, the language used related only to the holding of the court in the *Barnow* case, and that holding was solely that when congress passed a statute making it unlawful for a person falsely to pretend to be a government officer, congress meant by that statute, that the pretense would be just as culpable whether the pretending laid claim to being a real office holder or a counterfeit office-holder.

Neither the language nor the holding tend to sustain in the slightest degree what Appellant contends for here.

Section 215 is not a false pretense statute at all. It deals with the sale or solicitation to the sale of an actual office. Nothing in the Barnow opinion can

be construed as justifying the thought that the statute was intended to cover offices which had no existence as well as offices which did have existence. The Report of the Judiciary Committee quoted by Appellant at page 12 of the brief begins with these words: "This bill seeks to punish the purchase and sale of public offices". If the statute sought to deal with appointive offices and to cover offices which the defendant pretended to exist, then the reasoning of the *Barnow* case might rescue the present statute from its plain failure to do what Appellant is trying to get this court to stretch it into doing.

The fundamental fallacy of Appellant's entire argument grows out of failure to recognize the restricted area which may be covered by federal crimes, that they are all statutory and that crimes generally—e. g. a supposed fraud sought to be perpetrated by one citizen of Mississippi upon another involving an effort to sell a federal office when there was no federal office to sell—may be punished by the states alone. This court has, at its present setting, drawn attention again to that basic tenet of our dual system, *Rochim v. California*, 1952, 96 L. Ed., Adv. Sh. No. 5, 154, 156:

> "In our federal system the administration of criminal justice is predominantly committed to the care of the states. The power to define crimes belongs to congress only as an appropriate means of carrying into execution its limited grant of legislative powers. U. S. Const. Art. 1, Par. 8 Cl. 18. Broadly speaking, crimes in the United States are

what the laws of the individual states make them ".

Appellant's Other Authorities Inapposite.

But brief mention need be made of the other authorities relied on by the government. What has been said with respect to the *Barnow* case applies to them also. Of course, the *Ferger* case has no application at all *(United States v. Ferger* 250 U. S. 199, 63 L. Ed. 936).

Ferger was charged with fabricating and uttering fictitious bills of lading purporting to represent shipments in interstate commerce. This court pointed out categorically that there was no question that the charges of the indictment were embraced within the plain language of the statute. It was contended merely that congress had no constitutional authority to legislate in such matters. The only thing this court held in that case was that the power of the federal government to protect interstate commerce from fraud was full and complete under the commerce clause.

Pierce v. United States 314 U. S. 306, 86 L. Ed., 226, is Closer to the Point.

This case, decided by the court a quarter of a century after the *Barnow* case, comes much nearer furnishing a pattern for decision of the case now before the court. The court had the same statute before

it as that considered in the *Barnow* case, the False Impersonation Statute (18 U. S. C. 912).

In the *Pierce* case this court reversed a conviction because it was not entirely clear that Pierce came within the plain language of the statute. He had been convicted of pretending to be a government officer "selling T. V. A. units". The Court of Appeals for the Sixth Circuit had concluded that the evidence showed satisfactorily that Pierce was posing as an officer of the United States, this being its language in stating that conclusion, *Pierce v. United States* (Sixth Circuit, 1940) 155 F(2) 399, 401:

> ". . . the conviction was supported by evidence that Appellant held himself out not as an officer or employee of the Tennessee Valley Authority, but as 'acting under the authority of the United States government,' which is a quite different thing and clearly within the condemnation of the statute."

On the basis of that appraisal of the facts and coupled with the failure of Pierce to make due exception to a charge given by the trial court, the Court of Appeals affirmed the conviction. This court reversed. It was not satisfied with the evidence on the point whether Pierce was holding himself out as an agent of the United States government or an agent of T. V. A.

The government stressed the fact that congress had extended the terms of the personation statute so as to make it applicable to all corporations owned

or controlled by the United States. The government insisted strenuously that this showed a congressional intent to extend the protection of the personation statute to the government service generally, arguing that it was the clear intent of congress to protect the public service from false impersonations regardless of whether the pretender came strictly within the language of the statute or not. In other words, the government there made the same strenuous insistence that it makes here, that this court should apply such statutes so as to effect the palpable desire of congress to protect the public service regardless of whether the alleged offense is embraced in the strict language of the statute. But this court refused to follow that argument, holding:

> "These legislative extensions of the scope of the act were in accord with the growing importance of the administrative corporation, but a comparable judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness. Cf. *Lanzetta v. New Jersey*, 306 U. S. 451, 83 L. Ed., 888, and cases cited. While the act should be interpreted 'so as to give full effect to its plain terms' *Lamar v. United States* 241, U. S. 103, 112, 60 L. Ed., 912, 915; *United States v. Barnow*, 239 U. S. 74, 60 L. Ed., 155, we should not depart from its words and context."

The departure from "words and context" advocated by the Appellant here far transcends what the court refused to do there. The statute here deals with support or influence "in obtaining for any person

any appointive office or place under the United States".

An "office or place" is a concept which, though not a paragon of definiteness, has substance and ascertainable meaning. The statute relates, not to office generally, but to appointive office. The statute refers necessarily to an office which is real, not imaginary; actual, not fictitious; existing, not assumed or a speculative possibility; genuine, not fancied.

But that concept does not meet the needs of Appellant. The government was not content to charge the alleged crime in the language of the statute. It did not charge that Brashier used his influence to obtain for Harvey merely "an appointive office and place under the United States". It went further and charged that the appointive office or place was "to be set up and created under the office of Price Stabilization in Amite County, Mississippi," (R. 8).

Of course, no Ration Board had been set up in Amite County, Mississippi, and there was no chairman. The law did not provide for such an office or such an officer. The government found it necessary, therefore, to add to the "words and context" of the statute; and it now asks this court to enlarge the statute as written by adding words and context which the statute did not embrace. Such a course is clearly condemned under the *Pierce* case and many others.

It may be that congress could have written Section 215 so as to embrace not only existing offices but those to be created in the future if and when the exigencies supposed to be in contemplation, should arise. It is possible that congress might have written the statute in these words so as to satisfy what the government now contends for:

> "Any appointive office or place, now in existence, or within reasonable contemplation under existing laws and procedures."

That is exactly what the statute would have to contain if it is to be held to embrace the crimes sought to be charged in these counts of the indictment.

On the other hand, it may be that congress was fearful that the statute was already rather vague and that such an effort at enlargement of scope might run afoul the principles enunciated in the *Lanzetta* case referred to, *supra* in the quotation from the *Pierce* case:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the statute commands or forbids. The applicable rule is stated in *Connally v. General Constr. Co.*, 269 U. S. 385, 391, 70 L. Ed. 322, 328: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair

play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'"

In that connection, it is pertinent to point out that Section 215 was amended September 13, 1951, by public law No. 141, and that one of the reasons for the amendment was that the term "any appointive office or place" was considered an "ambiguous expression". See U. S. Code Congressional Service, 1951, page 2443. And further that the executive director of the Civil Service Commission and the Deputy Attorney General held conflicting ideas as to the meaning of the section. Ib. pages 2444-2447.

Penal Statutes Strictly Construed.

That the course advocated by Appellant here offends against principles enunciated by this court in numberless cases is plain. It is necessary to mention only two or three. The rule is well stated in *United States v. Resnick* 299 U. S. 207, 209-10, 81 L. Ed. 127, 129:

"Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. . . .Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses."

To like effect is the language of this court in *Prussian v United States* 282 U. S. 675, 75 L. Ed., 610, 612:

> "'But to extend the meaning of that phrase so as to embrace the endorsement on the government draft is to enlarge the statutory definition, and would be possible only by a strained construction of the language . . ., inadmissible in the interpretation of criminal statutes, which must be strictly construed."

During the current term, this court, remarking that the government was asking it "by a feat of construction radically to change the weights and balances in the scales of justice," repeated the admonition in apt words which apply here:

> "The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute."

We refer to the case of *Morissette v. United States*, No. 12, October Term, 1951, decided January 7, 1952, 96 L. Ed., Advance Sheets, 180, wherein the court gave an illuminating discussion of crimes, their nature and categories. To argue here that Brashier could be convicted of selling an appointive office without charging and proving that there was an appointive office which might be sold would me tantamount to arguing in the *Morissette* case that he could be convicted of stealing bomb casings without

showing that such articles were in existence, and that they were the property of the United States. The fact is that the statute under consideration by the court, bears a much closer analogy to that involved in the *Morissette* case (18 U. S. C. 641) then to a false pretense statute such as was involved in the *Barnow* case.

In referring to the shortcomings of the indictment in *United States v. Hess* 124 U. S. 483, 486, 31 L. Ed., 516, 518, this court stated that such an indictment would be "as defective as would be an indictment for larceny without stating the property stolen, or its owner, or the party from whose possession it was taken". Again, in *United States v. Cruikshank* 92 U. S. 542, 558, 23 L. Ed., 588, 593, this court said: "It is a crime to steal goods and chattels, but an indictment would be had that did not specify with some degree of certainty the articles stolen."

The attempt of Appellant to draw a parallel between an effort to sell an existing office which is not momentarily vacant and an office which has no existence falls of its own weight. One can not sell a public office unless there is a public office to sell. The correctness of this assumption is more manifest when one considers the companion statute (18 U. S. C. 214) making it illegal to "offer to procure appointive public office". That statute visits fine or imprisonment upon,

> "Whoever pays or offers or promises any money . . . in consideration of the use or promise to use

any influence to procure any appointive office or place under the United States . . ."

Would Appellant argue that a person could be convicted of offering money for influence in connection with a supposed appointive office that did not exist? The answer to that question and to the question posed under Section 215 is perfectly obvious. It is furnished by such cases as *Pierce v. United States, supra,* and the others here referred to. It is significant that the court, in the *Pierce* case, referred to Mr. Justice Holmes' decision in *United States v. Walter* 263 U. S. 15, 68 L. Ed., 137, in which that eminent jurist adverted to the duty of courts "to limit the generality of words in order to save the constitutionality of an act. . . ."

18 U. S. C. 215 is a Bribery Statute.

This statute appears in Chapter 11, headed "Bribery and Graft". Bribery connotes an offerer, a bribee and an "official function", required to be performed by a "person acting for or on behalf of the United States". Cf. 18 U. S. C. 201. Assuming that Harvey (count thirty-one, R. 8), was the offeror, Brashier the bribee, what was the "official function" which the government had the right to expect of Brashier? Presumably, it was an uninfluenced support for an "appointive office or place under the United States". Was there any such office or place *in esse* at the time? The stipulation of counsel and the judicial knowledge of the court below (R. 14-15),

gave a negative answer. So did the indictment itself (R. 8-9) which sought to supply by averment the necessary ingredient of the statutory bribe.

The terminology of the statute must be vague indeed if the phrase "any appointive office or place" can be stretched to embrace places, which, in the event of total war, might be created if the authorities decided to create them. Appellant calls on this court to exercise a legislative outreach apparently not heretofore conceived of. Cf. *Pierce v. United States*, *Lanzetta v. New Jersey*, *United States v. Strang*, *supra*, and *Krichman v. United States*, 256 U. S. 363, 65 L. Ed., 992.

Even where the other elements of an offense against bribery statutes are present, the "official function" must relate to an activity within the scope of the bribee's duties. *James v. Bowman* 190 U. S. 127, 47 L. Ed., 979; *Blunden v. United States* (Sixth Circuit) 169 F(2) 991; *United States v. Gibson* (Seventh Circuit) 47 Fed. 883; *Commonwealth v. Reese* (Kentucky) 29 Southwestern 352; *State v. Butler* (Missouri) 178 Missouri, 77 Southwestern 560.

Recent Case in Point—United States v. Halseth No. 91, October Term, 1951, Decided January 7, 1952, 96 L. Ed., Advance Sheets, 173.

The burden of the government's argument in this case, boiled down, is this: It is immoral and reprehensible to sell government offices; it is more repre-

hensible to sell a non-existent public office than to sell one which actually exists; congress has demonstrated a zeal for purifying the public service; therefore, this court should take heed of the spirit of congress and adapt the existing statute to meet the needs of any case an enthusiastic prosecutor may seek to make, whether the language of the statute embraces the particular case or not.

This court has answered that argument again and again; again and again it is repeated. This court has answered it again during the present term in a decision whose facts are in close parallel to those in the case under consideration.

Halseth was indicted for sending through the mails a "letter concerning a lottery or scheme offering a price dependent upon a lot or chance . . ." in violation of present 18 U. S. C. 1301, which reads in part as follows:

> "No letter, package, postal card, or circular concerning any lottery . . . or similar scheme offering prizes dependent in whole or in part upon lot or chance . . . shall be deposited in or carried by the mails. . ."

The parties stipulated for the purpose of motion to dismiss "that a letter, a circular, an order blank, and a punch-board were sent to the addressee by mail. The letter subtly indicated how the addressee might obtain a radio free by selling the chances on the punch board and how certain lucky numbers

would reward the purchaser with prizes. . . . The punch board contained an illustration of prizes to be won".

The District Court dismissed the indictment and the government appealed, arguing that Halseth's letter, accompanied by the order blank, the punchboard and full directions contained all of the elements of chance which the statute was designed to cover. If the letter of the statute did not cover Halseth's offense, certainly, it was argued, the spirit and reason and purpose of the statute, covered it fully and completely. This court rejected that argument because the indictment had the same infirmity as the indictment here—it did not refer to an *existing* lottery, but to a lottery which the addressee was invited to set into operation. This court cited as authority its decision in *France v. United States* 164 U. S. 676, 41 L. Ed., 595, from which it quoted the following:

> "The statute does not cover the transaction, and, however reprehensible the acts of the plaintiffs in error may be thought to be, we can not sustain a conviction on that ground. Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly . . . If it be urged that the acts of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation."

Based upon the reasoning of the *France* case, this court sustained the action of the District Court in dismissing the indictment for the identical reason the court below in the present case dismissed the indictment: Because Helseth's scheme did not constitute a lottery, which was an actuality, but a lottery which would come into being only if the addressee rose to the bait and embraced the proffered scheme. Here is the language of the court in the *Halseth* case:

> "The District Court held that even if these stipulated facts had been alleged in the indictment and accepted as true for the purpose of the motion to dismiss, still the indictment did not state an offense because the mailing did not concern an *existing* lottery or scheme to obtain prizes by lot or chance. The question, therefore, is whether the mailing of gambling paraphernalia that may be used to set up a lottery or similar scheme is a violation of the statute . . .
>
> "In the instant case, too, the statute is penal and must be strictly construed. We hold that the words 'concerning any lottery' mean an existing, going lottery or gambling scheme. The mailing does not purport to concern any existing lottery, and neither the addressee nor the appellee was engaged in the operation of a lottery or similar scheme. The lottery or scheme would come into existence only if the addressee put the paraphernalia into operation . . .
>
> "If punch-boards are to be added to the category of devices to be excluded, it is for congress to make the addition. The judgment is affirmed."

It would be hard to conceive that there would be validity in the government's position here in the light of decisions such as the one quoted from. What the court said there applies perfectly to this case with the changing of a few words. That statute applied only to existing lotteries. This statute applies only to existing offices.

II.

The Three Counts of the Indictment do not Relate to Appointive Federal Offices Dealt with in 18 U. S. C. 215.

Appellant's argument under Heading No. II, its brief, page 20, is entirely without merit. It seeks to advance the thought that since the appointive offices sought to be dealt with in these three indictments were "potential" offices they are embraced in the language of the statute. The quoted word is defined as "existing in possibility, not in fact". That definition comports with the argument. It is clear that, at most, the office sought to be described in the indictments was a possibility only.

At the time of the supposed sales, at the time the indictments were brought and now, rationing was not in existence; the temper of the times tells us that it will not come into existence in the absence of an all-out shooting war. It is pure speculation to assume that there would be a County Ration Board in event rationing should become a reality. Appellant seeks to

create a crime by piling assumption on top of assumption, possibility on possibility, speculation on speculation. Crimes are not created that way, particularly federal crimes. The whole argument answers itself.

Constitutional Questions Not Argued.

Appellees have, at every stage of these proceedings, insisted that their constitutional rights have been denied them (see e. g. their motion to dismiss. R. 10-11). When the case was called for argument in the court below, at the time the order appealed from was entered, they made known their readiness and willingness to proceed with their argument on the constitutional questions presented. (R. 17-18.) They stand ready now to present their arguments challenging the constitutionality of the statute and of the proceedings taken under it, if and when the court should desire such argument. Appellant has not touched on the constitutional questions and the court below did not pass on them in the order appealed from. (R. 14-15.) Appellees do not, therefore, present their arguments on the constitutional questions, but desire that it be clearly understood that they do rely on their constitutional rights as raised by them at the various stages of these proceedings, and that they do not waive such rights.

CONCLUSION.

The argument has spun out too long. Federal crimes are statutory. They are bound to deal with realities, not possibilities. They must be spelled out by statutes plain and understandable in their terms. The three counts of the indictment do not state facts or charge crimes embraced in the statute. The court below was manifestly correct in sustaining the motions to dismiss.

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